

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

In re:	§	
	§	
A'GACI, L.L.C.	§	Case No. 19-51919-RBK
	§	
Debtor.	§	Chapter 11

**APPLICATION TO COMPROMISE AND SETTLE WITH TEXAS COMPTROLLER OF PUBLIC
ACCOUNTS
PURSUANT TO BANKRUPTCY RULE 9019**

This pleading requests relief that may be adverse to your interests.

**If no timely response is filed within twenty-one (21) days from the date of service,
the relief requested herein may be granted without a hearing being held.**

A timely filed response is necessary for a hearing to be held.

TO THE HONORABLE H. RONALD B. KING, UNITED STATES BANKRUPTCY JUDGE:

COMES NOW Randolph N. Osherow, the duly appointed Chapter 7 Trustee, by and through his attorney, and pursuant to Federal Rule of Bankruptcy Procedure 9019, files this *Trustee's Application to Compromise and Settlement With Texas Comptroller of Public Accounts Pursuant to Bankruptcy Rule 9019* (the "Application"), and would respectfully show the Court as follows:

**I.
INTRODUCTION**

1. The Chapter 7 Trustee seeks approval of and authority to enter into a settlement (the "Agreement") with Texas Comptroller of Public Accounts ("Comptroller") pursuant to Rule 9019. On September 24, 2019, Comptroller filed Adversary Proceeding No. 19-5054 (the "Adversary Proceeding") against A'GACI, LLC and Second Avenue Capital Partners, LLC. ("Second Avenue"). The proposed agreement will result in prompt settlement of a substantial portion of the Adversary Proceeding which is certain to be protracted and costly litigation. Accordingly, and as set forth herein, the Chapter 7 Trustee believes that the Agreement should be approved pursuant to Rule 9019.

II. **JURISDICTION**

2. This Court has jurisdiction to consider this matter under 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding under 28 U.S.C. § 157(b).

3. Venue is proper before this Court under 28 U.S.C. §§ 1408 and 1409.

4. Relief is sought pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure.

III. **BACKGROUND**

5. This case was filed as a chapter 11 bankruptcy on August 7, 2019. Significant events occurred during the pendency of the Chapter 11 proceeding of which this Court is fully aware.

6. On October 4, 2019, the case was converted to chapter 7, at which time Randolph N. Osherow was appointed as Chapter 7 Trustee and continues to act in that capacity.

7. On September 24, 2019, Comptroller filed the Adversary Proceeding against A’GACI, LLC and Second Avenue.

IV. **TERMS OF SETTLEMENT**

8. The proposed Agreement resolves complicated and likely protracted litigation with Comptroller, litigation in which a legal or financial success for the estate is far from certain. The Chapter 7 Trustee believes the Agreement is in the best interest of this chapter 7 estate. As will be more fully set forth in a form of order agreed to by the parties, the respective terms of the compromise are as follows:

- a. Trustee will cause sales tax returns to be filed for August 2019;
- b. Trustee shall pay post-petition sales tax liability;¹
- c. Trustee will pay an additional \$38,738.10 for a portion of the prepetition trust funds;

¹ The amount of post-petition sales tax liability will be determined by the completed sales tax returns for August 2019. At this time, the amount of post-petition sales tax liability is estimated to be approximately \$357,668.85.

- d. The filing of the tax returns and payment of the amounts listed above is a condition precedent to settlement becoming binding on the Comptroller;
- e. Comptroller shall receive an allowed priority claim in the bankruptcy case for the remainder of prepetition sales tax liability once liquidated.
- f. Comptroller shall release the Estate from any further post-petition liability.

V.
REQUESTED RELIEF

8. By this Application, the Chapter 7 Trustee respectfully requests entry of an order pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure approving and authorizing him to enter into the Agreement and resolving the claims pursuant to the terms set forth herein. The Chapter 7 Trustee also requests that the order approving this settlement authorize him to execute such documents as he, in his judgment, deems necessary to effectuate the settlement, including but not limited to any settlement or release agreements that may be required to fully effectuate this settlement.

VI.
GROUND FOR RELIEF

9. Rule 9019(a) of the Federal Rules of Bankruptcy Procedure provides in relevant part that on application by a trustee and after notice and a hearing the Court may approve a compromise or settlement. “Settlements and compromises are a normal part of the process of reorganization.” *Protective Comm. Four Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 428 (1968) (quoting *Case v. The Los Angeles Lumber Prod. Co.*, 308 U.S. 106, 130 (1939)).

10. The decision whether to approve a particular settlement lies within the discretion of the Bankruptcy Court. *American Can Co. v. Herpel, (In re: Jackson Brewing Co.)*, 624 F.2d 605, 607 (5th Cir. 1980). “A reviewing court will uphold the approval of a settlement if it is the result of adequate and intelligent consideration of the merits of the claims, the difficulties of pursuing them, the potential harm to debtor’s estate caused by the delay, and the fairness of the terms of the settlement.” *TMT Trailer Ferry, Inc.*, 390 U.S. at 434.

11. The Fifth Circuit has held that in deciding whether to approve a settlement, courts should evaluate and set forth in comprehensive fashion:

- a. probability of success in the litigation, with due consideration for the uncertainty in fact and law;
- b. the complexity and likely duration of the litigation and any intended expenses, inconvenience, and delay; and
- c. all other facts bearing on the wisdom of the compromise.

In re Jackson Brewing Co., 624 F.2d at 607-08.

12. The Trustee believes that the proposed settlement is in the best interest of the Chapter 7 Estate because it results in a fair and equitable compromise after consideration of the aforementioned factors. Further, it resolves a multi-faceted legal dispute with Comptroller, which could be both lengthy and costly, and it facilitates payment of certain claims to Comptroller. Therefore, in the Trustee's assessment, this settlement results in significant savings to the Chapter 7 Estate and its creditors.

Probability of Success on the Merits:

13. This matter is contested by the parties. All parties and their respective counsel believe that they will prevail on the merits. The Trustee, in exercising his business judgment, believes that the proposed settlement will adequately reduce the risk to the Chapter 7 Estate. Further, the Chapter 7 Estate has limited resources to fund any of the litigation. The Trustee prefers to allocate resources to the payment of claims rather than to fund speculative litigation that may not yield an economic benefit to the Chapter 7 Estate. The Trustee, having reviewed the matter, has determined that the risk of prevailing through litigation of the Adversary Proceeding, is questionable and the associated cost will redound to the detriment of the Chapter 7 Estate.

Other Factors:

14. In addition to contributing to the prompt administration of this Chapter 7 Estate, approval of and authority to enter into the Agreement allows the Trustee to pay claims more expeditiously than if the Trustee were required to fully litigate the lawsuit.

15. It is the sound business judgment of the Chapter 7 Trustee, after thorough consideration of the aforementioned factors, that the proposed settlement is in the best interest of this Chapter 7 Estate. The Trustee submits that the terms of the proposed Agreement fall within the reasonable range of litigation possibilities as set forth in *TMT Trailer Ferry, Inc.*, supra.

Relief Requested:

16. In accordance with this Application, the Chapter 7 Trustee seeks to compromise and settle claims between the parties as provided herein.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Randolph N. Osherow, Chapter 7 Trustee, respectfully requests that the Court grant this Application and approve the proposed settlement under the terms set forth herein and for such other and further relief to which he may show himself justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

By my signature below, I hereby certify that on the 29th day of January, 2020 a true and correct copy of the foregoing document was served upon the parties on the attached mailing matrix via electronic means as listed on the Court's ECF noticing system or by regular first class U. S. Mail.

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